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No. 756

In the Supreme Court of the United States

OCTOBER TERM, 1960

LEO C. GONZALES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (R. 3-15;[1] Pet. App. I, 1-8) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 31, 1960 (R. 16). A petition for rehearing was denied on January 28, 1961 (R. 22). The

[1] "R." refers to the record of the court of appeals certified to this Court. "Tr." refers to the separate bound volume of the transcript in the court of appeals, incorporated by reference in the above record (R. 1).

petition for a writ of certiorari was filed on February 24, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, assuming that a false statement under the second clause of 18 U.S.C. 1001 is required to be material, an indictment is valid where materiality appears from the specific facts charged.[2]

STATUTE AND RULE INVOLVED

18 U.S.C. 1001:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Rule 7, F. R. Crim. P.:

> (c) *Nature and Contents.* The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be

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[2] Petitioner states a preliminary question, *i.e.*, whether materiality is required under the second clause, but since that question was resolved in his favor by the court below, it is not now involved here.

signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. * * *

STATEMENT

Petitioner was convicted, upon the verdict of a jury, on four counts[3] of making written misrepresentations to the Rural Electrification Administration in violation of 18 U.S.C. 1001 (Tr. 25-26). Petitioner was fined $1,000 on each of the four counts and was sentenced to 5 years' imprisonment on each of two counts, the imposition of sentences on the remaining two counts being suspended (*ibid.*). The court of appeals affirmed (R. 16).

The indictment (Tr. 4-6) alleged that petitioner, as manager of the Kit Carson Electric Cooperative, Inc., a cooperative under contract for financing with the R.E.A., knowingly and willfully made false representations "in a matter within the jurisdiction of the Rural Electrification Administration." The misrepresentations charged were that petitioner falsely stated on September 23, 1958, in a letter to the R.E.A., that the records of the cooperative showed the accounts of 8 persons, including himself, in the aggregate sum of $4,000, to have been paid in full (count 1); that petitioner, on July 1, 1957, and April 15, 1959, in reports to the R.E.A., falsely listed certain machinery and items valued at $6,000 and $800, respectively, as assets of the coopera-

[3] A fifth count (count 3) was withdrawn from the jury because of a variance in the proof (Tr. 169).

tive (counts 2 and 4); and that on January 15, 1957, petitioner failed to include in a report to the R.E.A. an amount of $17,410.84, constituting an asset of the cooperative (count 5).

The testimony disclosed that petitioner had taken for his personal use the proceeds of the checks drawn on the cooperative for the $6,000 and $800 assets and of the check for $17,410.84 payable to the cooperative (Tr. iii (Ex. 19-20, 23, 32), 81-86, 94, 130-131, 136-144, 148-150, 155, 158). The deed of trust of the assets of the cooperative, securing the loan to it by the R.E.A., required the cooperative to make such reports, keep such records, and allow such examinations of records as the administrator requested (Tr. 99). The reports containing the misrepresentations were of the prescribed Forms No. 40-R 181.11 and .12 (Tr. 203-207, 211-217, 229-231), and the letter concerning accounts receivable was in reply to a specific inquiry (Tr. 221). The reports were virtually the sole source of information to the government as to the maintenance and handling of the assets of the cooperative, and were also the basis of determining amounts of money required and of other administrative functions of the R.E.A., including its reports to Congress on the soundness of the outstanding loans (Tr. 35-63).

ARGUMENT

The question whether the second clause of 18 U.S.C. 1001 requires materiality in the alleged misrepresentations (as to which there is a conflict of authorities) was resolved in petitioner's favor by

both courts below and is not before this Court. The only question now before the Court is whether materiality must, as petitioner contends, be alleged in *haec verba*, or whether it is sufficient to specify the facts by which materiality—essentially a conclusion—is established. On that question, there is no conflict. The variations in the holdings of the courts are over whether the particular facts alleged adequately show the materiality of the misrepresentations. In this case, the facts charged in detail in the indictment amply show the materiality of the misrepresentations.

It was here charged that petitioner, while manager of a cooperative which was a borrower from the Rural Electrification Administration, willfully made false statements in reports of the cooperative's assets to the R.E.A. The false statements were specified as representations that accounts owed to the cooperative by members of its Board of Directors and staff members, in the aggregate sum of $4,000, had been paid, and misrepresentations or concealment of diverted assets, in the amounts, respectively, of $6,000, $800, and $17,410. The indictment thereby alleged falsifications that were intrinsically and patently material, especially in view of additional allegations in the indictment stating the financing relationship between the petitioner's organization and the R.E.A. and the allegations that the misrepresentations were in a matter "within the jurisdiction" of the R.E.A. In short, misrepresentations by a borrower from the government as to the financial assets of the borrower are necessarily material.

If materiality may be read into the statute although the word does not appear therein, so materiality may be shown by the facts alleged in the indictment, although the word "material" is not used. As observed by Judge Frank, concurring in *United States* v. *Silver*, 235 F. 2d 375, 378 (C.A. 2), certiorari denied, 352 U.S. 880:

> * * * In statutory terms, the indictment alleged that the false statements were made "in a matter within the jurisdiction of a department of the United States." If the statute, correctly interpreted, makes materiality an essential part of the crime, then the statute, although not expressly referring thereto, nevertheless, by implication, imports the element of materiality. Accordingly, the indictment, using the very words of the statute, necessarily by implication imports an allegation that the false statements were material. To put it differently, if the statute, without mentioning materiality, implies that element, then so does the indictment; the shorthand expression sufficient in the one is equally sufficient in the other. Consequently to dismiss the indictment merely because it omitted the word "material" would be irrational and contrary to modern pleading practice.

And see, in accord, *Bost* v. *United States*, 103 F. 2d 717, 720-721 (C.A. 9); *Fisher* v. *United States*, 231 F. 2d 99, 102 (C.A. 9); *United States* v. *Lohman*, 127 F. Supp. 432, 434 (S.D. Ohio), affirmed *sub nom. Hupman* v. *United States*, 219 F. 2d 243, 245 (C.A. 6), certiorari denied, 349 U.S. 953; *United States* v. *J. R. Watkins Company*, 16 F.R.D. 229,

235 (D. Minn.). See, also, forms Nos. 3 and 10 appended to Rule 7(c), F. R. Crim. P.

The decisions cited by petitioner, where materiality was held to be inadequately alleged, do not rest on the failure to allege that the misstatements were "material" in so many words, but on a failure to allege "facts which show them to be" material, or which show materiality "in substance" (*Rolland* v. *United States*, 200 F. 2d 678, 679-680 (C.A. 5), certiorari denied, 345 U.S. 964); or "facts showing that the alleged false statement was material" (*Meer* v. *United States*, 235 F. 2d 65, 67 (C.A. 10)). And see *United States* v. *Okin*, 154 F. Supp. 553, 555 (D. N. J.); and *United States* v. *Grossman*, 154 F. Supp. 813, 817 (D. N.J.).[4]

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[4] The decisions cited by petitioner, holding that an element of the offense could *not* properly be inferred from what was stated in the indictment, are inapposite. The missing elements were as follows: in an indictment for obstructing justice, the failure to allege that the person approached was a prospective witness (*Williams* v. *United States*, 265 F. 2d 214, 217-218 (C.A. 9)); in an indictment for first degree murder in which the indictment expressly excluded premeditation, the failure to charge "any one of the" necessary elements substituting for premeditation, such as rape, arson, burglary, or robbery (*Ornelas* v. *United States*, 236 F. 2d 392, 391 (C.A. 9)); in an indictment for aiding and abetting, the failure to allege the offense committed by the principal (*United States* v. *Tornabene*, 222 F. 2d 875, 878 (C.A. 3)); and in an indictment for the felony of attempted evasion of a tax, the failure to allege anything but the misdemeanor of non-payment of the tax (*Clay* v. *United States*, 218 F. 2d 483, 486 (C.A. 5)). None of these instances is comparable to the instant case where all the facts showing materiality are alleged and the only omission is of the conclusory characterization of the misstatements as being "material."

CONCLUSION

The judgment below is a correct application of established principles to a particular factual situation. No conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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